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82-855
NO.

In the Supreme Court of the United States

OCTOBER TERM, 1982

ALFRED S. JORDAN,
Petitioner

versus

WILLIAM F. BOLGER,
POSTMASTER GENERAL OF THE UNITED STATES
Respondent

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a discharge notice to a preference eligible Government probationary employee, consisting of one sentence, meets regulatory, statutory or constitutional due process requirements.

The notice: "Due to unsatisified (sic) performance during your probationary period, your employment at the Aberdeen Post Office will be terminated at the close of the work day Friday August 26, 1977."

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1982

No.

ALFRED S. JORDAN,
Petitioner

versus

WILLIAM F. BOLGER,
POSTMASTER GENERAL OF THE UNITED STATES,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Fifth Circuit rendered August 25, 1982.

OPINIONS BELOW

The U. S. Court of Appeals for the Fifth Circuit affirmed the U. S. District Court judgment in a judgment dated August 25, 1982 (Appendix A). The U. S. District Court for the Northern District of Mississippi, Memorandum of Decision (Appendix B) and Judgment of dismissal (Appendix C) were issued on October 5, 1981. The District Court decision is reported at 522 F. Supp. 11197 (N.D. Miss. 1981).

GROUNDS FOR JURISDICTION

Petitioner seeks review by this Court of the Fifth Circuit judgment pursuant to rule 17.1(c) of the Rules of the Supreme Court and 28 U.S.C. 1254(1). The original suit was filed in the District Court under the Age Discrimination in Employment Act 29 U.S.C. 623(a)(1) and the Administrative Procedures Act, 5 U.S.C. 551 *et. seq.*

STATUTE INVOLVED

39 U.S.C. 1005: Applicability of laws relating to Federal employees

(a) (1) Except as otherwise provided in this subsection, the provisions of chapter 75 of title 5 shall apply to officers and employees of the Postal Service except to the extent of any inconsistency with —

(A) the provisions of any collective-bargaining agreement

negotiated on behalf of and applicable to them; or

(B) procedures established by the Postal Service and approved by the Civil Service Commission.

(2) The provisions of title 5 relating to a preference eligible [as that term is defined under section 2108(3) of such title] shall apply to an applicant for appointment and any officer or employee of the Postal Service in the same manner and under the same conditions as if the same officer, or employee were subject to the competitive service under such title. The provisions of this paragraph shall not be modified by any program developed under section 1004 of this title or any collective-bargaining agreement entered into under chapter 12 of this title.

REGULATION INVOLVED

5 C.F.R. 315.804: Termination of probationers for unsatisfactory performance or conduct.

When an agency decides to terminate an employee serving a probationary or trial period because his work performance or conduct during this period fails to demonstrate his fitness or his qualifications for continued employment, it shall terminate his services by notifying him in writing as to why he is being separated and the effective date of the action. The information in the notice as to why the employee is being terminated shall, as a minimum, consist of the agency's conclusions as to the inadequacies of his performance or conduct.

STATEMENT OF THE CASE

Plaintiff is a veteran with a "ten point" disability rating. He

attained the rank of Tech Sergeant in the Armed Services and in March 1974 was placed on the hiring register at the Post Office in Aberdeen, Mississippi, after attaining a score of 92.7. At that time he was 46 years old.

He was not called for an interview for three years. On one occasion the postmaster told him that he would have to "re-test" and that a job had been promised to another younger clerk who was on the register at another post office. The statement that plaintiff would have to "re-test" was not accurate.

Other postmasters in the area advised him to seek help and plaintiff sought assistance from sectional postal headquarters at Meridian, Mississippi, who advised plaintiff and the Aberdeen postmaster that plaintiff would not have to take the examination again and that veterans received preference over non-veterans.

Plaintiff claims the postmaster told him that since the plaintiff had gone over his head he "didn't know what he would do." On July 2, 1977, plaintiff was hired by the Postal Service and claims that the Superintendent of Mails told him, "I guess you know I don't have to hire you. I promised I would never hire anybody who called Meridian."

Two letter carriers heard the superintendent say that he was going to "hire and fire" plaintiff. Plaintiff, after four or five days on the job, sought assistance from a veteran advisor, and a former

Postal Service official at Columbus, Mississippi. He told the veterans' advisor that it "Looks like to me they are out to get me before I even start to work."

On July 8, 1977, the third regular work day plaintiff began work on his own, the superintendent entered a written derogatory remark in a confidential file he began keeping on the plaintiff. He also secured a derogatory written report from employee Mrs. Moon. (Mrs. Moon is the young woman who was hired the same day plaintiff was, and is the person the postmaster wished to hire.) Both employees were employed on Saturday, July 2. Plaintiff was "trained" on Saturday, July 2 and Tuesday, July 5 (Monday was a holiday, July 4) by Mrs. Moon. He began work on his own on Wednesday, July 6.

On August 24, 1977, plaintiff was handed a short termination notice: "Due to unsatisified performance during your probationary period, your employment at the Aberdeen Post Office will be terminated at the close of the work day Friday August 26, 1977."

Mary Boone, seventeen years of age, was hired to replace plaintiff on August 25, 1977.

Plaintiff then began a long and frustrating effort to find out what his alleged inadequacies were and to get a hearing. At one point, the Postal Service ruled that plaintiff's attorney could not request a hearing. This decision was reversed by the EEOC.

On September 7, 1978, over a year after his discharge, plaintiff was shown the private handwritten notes kept by the superintendent. He responded to each of the allegations by affidavit. On April 7, 1980, plaintiff notified the EEOC that if "provisions are not made for a full hearing" within 45 days, suit would be filed. No word was received from the Postal Service or the EEOC and on August 28, 1980, a complaint was filed.

ARGUMENT

The Termination Notice Does Not Comply With the Statute, Regulation or Due Process Requirements

The District Court held that the Administrative Procedures Act (APA) did apply to judicial review of the Postal Service's personnel actions concerning the question of *procedural* due process (App. p. B-10) and that a Postal Service probationary employee was entitled to advance written notice consisting of "conclusions as to the inadequacies of his performance" (App. p. B-11); however, the District Court found that the notice received by Mr. Jordan did comply with Section 315.804's requirement and that he was "deprived of no procedural rights."

Thus, the narrow question before the Fifth Circuit concerned the adequacy of the written notice received by the petitioner --- not whether the APA should be applied to the Postal Service. The Postal Service did not address the question but, instead, argued that

the APA did not apply to the Service and that no action by the Postal Service was subject to judicial review.

The Fifth Circuit, without written opinion, affirmed the dismissal thereby adopting the lower court's opinion that the dismissal notice complied with Section 315.804.

The reason given the plaintiff for his discharge consisted of two words (one of them used improperly and misspelled) in a one sentence discharge notice: "unsatisified (sic) performance." Aside from being intensely frustrating to the plaintiff, this notice does not meet the basic minimum requirements of the applicable regulation, 5 C.F.R. 315.804.

The unnecessary curtness of this notice, together with his perception of the background facts, caused the plaintiff to expend the better part of his time and resources for two or three years to attempt to find out why he was discharged -- or at least to require his former U.S. Government employer to state the conclusions of his inadequacies.

The regulation (5 C.F.R. 315.804) recognizes the basic courtesy that should be extended to any citizen who has passed an examination, waited his turn on the register, and received a career-conditional appointment. But there is considerably more than courtesy or frustration involved. An employee who has received an appointment that can reasonably be assumed to be "permanent"

and made his plans accordingly, can not cope psychologically, logically or legally with a discharge notice consisting of two descriptive words.

Perhaps of more importance than the frustration of the employee, is that of his advisor or attorney to whom he goes for help. There is no possible response to an accusation that one has "unsatisified" performance -- except to contend that the performance is "satisfied." Federal probationary employees do have a right to administratively appeal their removal when it is based on "conditions arising before employment" (5 C.F.R. 315.805) and "discrimination" (5 C.F.R. 315.806). The termination notice received by plaintiff did not give him (or his attorney) an opportunity to intelligently weigh the possible remedial avenues or to make a response. (Perhaps that is why the Postmaster General, and other Postal officials kept informing the plaintiff that he had no appeal rights -- they could not decipher the termination notice, either. A synopsis of the plaintiff's attempts and frustrations at securing an administrative resolution are described in the complaint.)

The OPM regulation requiring written "conclusions of the inadequacies" of a probationer is reasonable and necessary. If it is not so, the burden would be upon the respondent to show why it is not. "It is basic due process that the Government can not set up regulations and then disregard them." *Brown v. United States*, 377 F. Supp. 530, at p. 539 (D.C. Tex. 1974).

upheld in the Fifth Circuit:

> Specifically, during your initial orientation and training, you were given an overall evaluation of fair to poor in many areas and your test scores were far below your class' average. Further, the concensus of opinion from the Staff Training Coordinator and the majority of the instructors is that you lack initiative, common sense, and awareness of your surroundings. You are perceived as a very rigid individual who sees things as either black or white.

Budnick v. Merit Systems Protection Board and U.S. Department of Justice, 643 F.2d 278 (5th Cir. 1981).

Full compliance with Section 315.804 is not very difficult because it requires only that conclusions of the inadequacies be stated. The Postal Service official who drafted the notice to appellant Jordan could have used another 30 minutes and stated some conclusions -- provided, of course, there really were some. His failure to do so supports the appellant's contention that the discharge was not made in good faith.

The statute which governs Postal Service employees, 39 U.S.C. 1005 (1970), clearly provides that the U.S. Civil Service Commission shall approve Postal Service personnel procedures.

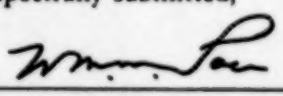
CONCLUSION

The Fifth Circuit has in at least two prior cases, indicated that a written discharge notice to a Federal probationer, must contain at

least a conclusion of some specific inadequacy. In this case the appellate court affirmed two words ("unsatisified (sic) performance") as being adequate, leaving the employee, or his advisor, with no opportunity to determine if he had any appeal rights.

The Supreme Court has not previously considered this issue and is urged to do so now.

Respectfully submitted,



WILLIAM M. PACE
Attorney for Petitioner

CERTIFICATE OF SERVICE

In compliance with the rules, I certify that I have this date served three copies of the above petition for writ of certiorari upon the Solicitor General of the United States, U.S. Department of Justice, Washington, D.C. 20530 and three copies upon John Hailman, Assistant U.S. Attorney, P. O. Box 886, Oxford, Mississippi 38655 by first calss mail.

This the 19th day of November, 1982.

WILLIAM M. PACE

APPENDIX A

UNITED STATES COURT OF APPALS

For The Fifth Circuit

No. 81-4462
Summary Calendar

D. C. Docket No. CA EC80-207-WK-P
Alfred S. Jordan,
Plaintiff-Appellant,

versus

WILLIAM F. BOLGER, Postmaster General
of the United States, et al.,
Defendants-Appellees

Appeal from the United States District Court for the
Northern District of Mississippi

Before: BROWN, GEE and RUBIN, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal and was taken under submission by the Court upon the record and briefs on file, pursuant to Rule 18;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

IT IS FURTHER ORDERED that appellant pay to appellees the costs on appeal, to be taxed by the Clerk of this Court.

AUGUST 25, 1982

ISSUED AS MANDATE: SEPTEMBER 16, 1982

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

No. EC 80-207-WK-P

ALFRED S. JORDAN, Plaintiff

v.

WILLIAM F. BOLGER, POSTMASTER GENERAL OF THE UNITED STATES AND ELEANOR HOLMES NORTON, CHAIRMAN OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Defendants

MEMORANDUM OF DECISION

In this employment discrimination action, plaintiff Alfred S. Jordan sues defendant William Bolger, Postmaster General of the United States, contending that he was wrongfully discharged from his job as part-time clerk-carrier with the United States Postal Service in Aberdeen, Mississippi. Plaintiff bases his claims on the Administrative Procedure Act, 5 USC § 551 et seq. and the Age

Discrimination in Employment Act, 29 USC § 621 et seq., alleging that his termination was arbitrary and capricious and because of his age. Cross motions for summary judgment have been previously denied. After evidentiary hearing and oral argument, the court makes findings of fact and conclusions of law as required by Rule 52 (a), F. R. Civ. P., as follows:

I. FINDINGS OF FACT

In 1974, plaintiff, then age 48, took the postal examination and achieved a score of 92.8 including a ten point veteran's preference, which made him the top scorer then on the Aberdeen register. J. K. Baker, the postmaster, told plaintiff he would be notified when a position became available.

In November 1976, Baker employed Cecelia Moon, who had been a part-time postal clerk at Prairie, Mississippi, as a temporary worker during an employee's illness. When a vacancy occurred for the position of carrier, he first offered the job to her, and she refused. He then offered the position to Wayne Garner, a postal worker at Tupelo who was desirous of being transferred to Aberdeen. Garner accepted. When appointed, Garner, who was over 40 years of age, was not only a transferee but also then tested as No. 1 on the Aberdeen register as a ten point veteran and having a higher score than plaintiff. Under postal regulations, Baker, as the hiring authority, had the option of filling any vacancy by hiring a postal employee transferred from another post office or choosing one of the top three on the Aberdeen register, with preference required for veterans over nonveterans. The postmaster was not

required, however, to hire from those on the registry so long as he filled the vacancy with a transferee. It was Baker's practice in hiring from the register to select the person having the top score at the time of appointment.

In mid-November 1976, plaintiff again contacted Baker, who stated that he would have to retake the examination. Being informed to the contrary, plaintiff consulted Mrs. Elaine Byrd, Director of Employee Relations, at Meridian, Mississippi. He complained to her that he was intentionally being passed over by Baker and he had been told that he was required to retest. Mrs. Byrd advised Baker by phone that under revised regulations plaintiff would not have to retest; she also reported to Baker plaintiff's complaint that he was being passed over. In a subsequent conversation, Baker told plaintiff that most other postmasters would never hire him because he had gone over his head. Nevertheless, in June 1977, Baker notified plaintiff to report for work as a part-time clerk-carrier on July 2, 1977. On that same day, Cecelia Moon, who had been continued in temporary employment, was also appointed clerk-carrier as a transferee from Prairie.

According to plaintiff, on the day he reported for work, Baker and Bobby Jackson, Superintendent of Postal Operations, began to openly talk about firing him. Two rural mail carriers, B. D. Allen and Nelson Outlaw, testified that they heard Jackson say that he would "hire and fire" plaintiff because he had gone "over his head." Plaintiff claims that Baker told him, "you'll have to do so many schemes per minute or we will have to let you go."

Plaintiff's first two days on the job (Saturday July 2 and Tuesday July 5) consisted of accompanying Cecelia Moon, who had worked the route to which plaintiff was assigned, in delivering mail on City Route # 3. This training to plaintiff was provided to teach him to case the mail, become familiar with the stops and other duties of the job. Problems with plaintiff's performance began on Wednesday, July 6, when he made his first delivery alone. After plaintiff had cased the mail, Jackson, plaintiff's immediate supervisor, handed him a bundle of advertising circulars also for Wednesday delivery. Plaintiff was unable to deliver all of the circulars that day. Plaintiff asserted that he did not have sufficient time to complete delivery since the circulars were not in the order of the addresses along the route. Jackson, however, disputed this, saying they were presorted according to route sequence. Plaintiff claimed that he combined the remaining circulars with other mail and delivered them the next day. On Thursday, Jackson discovered a number of the circulars in the undeliverable mail bin. Though plaintiff contended they were duplicates, Jackson said they were in fact for addresses on his route. On Friday morning plaintiff reported to Jackson that he had delivered the remaining circulars. Later the same day Jackson observed some of the same circulars under the seat of plaintiff's jeep, and when shown them, plaintiff said someone else must have put them there. Plaintiff continued to maintain he had delivered all of the circulars. Plaintiff's testimony was flatly contradicted by Jackson, who stated that on Saturday he assigned another carrier to deliver the circulars on plaintiff's route. The following Monday Jackson reported the incident to Baker, who had been off the previous week. When plaintiff appeared before Baker, he continued to insist that he had delivered the circulars. That remained his

position at trial.

Other incidents arose which made plaintiff's performance appear questionable, such as mislabeling mail, coming to work late, failure to dispatch all outgoing mail, failure to keep proper time record, and taking excessive time to case and deliver the mail.

As a probationary employee, plaintiff was subject to 30, 60 and 90 day evaluations by Jackson, his immediate supervisor. On August 1, Jackson made out the 30-day evaluation on plaintiff's performance and presented him with the evaluation sheet, Form 1750. Three blocks on the form were checked to indicate unsatisfactory performance for casing mail, following instructions and being late for work. Other portions of the form were left blank without rating, yet Jackson had indicated on the form his recommendation that plaintiff be retained. The purpose of the evaluation was to advise the probationary employee of the need to improve in those areas criticized by the supervisors. After reviewing the form with plaintiff, Jackson requested plaintiff to sign it, and he refused, stating that he needed time "to check things out." Jackson agreed to defer the matter for a week. Plaintiff conferred with a veteran's official, James Fitzpatrick, who advised him not to sign an evaluation which was incomplete. When Jackson approached plaintiff about signing, he refused again, but gave Jackson no reason for his action.

Plaintiff was later given written notice of his termination effective August 26, because of unsatisfactory performance. A list of the specific incidents of which Jackson kept a record was not then

furnished plaintiff.

Plaintiff at trial tendered an explanation for each shortcoming or mistake committed on the job. The gist of his testimony was that he tried to perform as best he could but received inadequate training for proper performance and felt he was not fairly treated by Baker and Jackson. Allen expressed an opinion that plaintiff received very little training. Other postal employees indicated that plaintiff seemed to be trying his best. Nevertheless, Mrs. Moon and Garner stated that their own training was no different than plaintiff's. Plaintiff never approached Baker or Jackson about needing more training.

Other probationary employees also received evaluations similar to plaintiff's after a month on the job. Moon's and Garner's evaluations each had unsatisfactory marks as well. They did not question the purpose of the evaluation, and signed the forms at Jackson's request. Jackson used their evaluation sheet to point out to Moon and Garner the areas in which they needed improvement. Moon's and Garner's reports were completely filled out, but Jackson stated that he intentionally did not complete plaintiff's form because if he checked all areas in which plaintiff was unsatisfactory, he would have been unable to recommend to Baker that plaintiff be continued in employment.

Jackson discussed the several incidents involving plaintiff with Baker, who testified that he then began considering firing him. The postmaster first sought the opinion of postal employees who had worked with plaintiff as to his job performance and received

adverse reports. Allan Pace, a postal clerk, told Baker that he did not think plaintiff would make it. Moon told Baker that despite his efforts, plaintiff was slow doing his work, forgetful, error prone, and not performing well. Baker at this time decided to dismiss plaintiff and terminated him August 26, 56 days after starting on the job.

The weight of the evidence supports Baker's and Jackson's position that plaintiff was fired because of his unsatisfactory work performance. Only Allen and Outlaw supported plaintiff in his assertion that Baker and Jackson intended to fire plaintiff from the very outset of his employment. Furthermore, they were the only witnesses who said that plaintiff had received inadequate instructions and training. We decline to give credence to their testimony. The evidence shows both Outlaw and Allen had their delivery routs shortened because of postal requirements. This action resulted in their pay being cut by approximately $5,000 per year. Their filing of several grievances against management indicates bias against the Postal Service and hostility toward Baker and Jackson.

Having no reason to doubt the veracity of opposing testimony, we find as a fact that Baker and Jackson did not act arbitrarily and capriciously in firing plaintiff. Baker impressed the court that he was in fact fair and considerate of plaintiff's situation. Jackson, who had known plaintiff since high school, did not oppose his employment and only sought to give him efficient supervision. We reject any notion that either Baker or Jackson were motivated by animosity or spite in regard to plaintiff. We further find as a fact

that plaintiff was given sufficient training, but nevertheless failed to do satisfactory work. His proffered explanations for persistent errors, inability to complete the tasks on time, and to comprehend the job are unconvincing. The credible evidence, in our opinion, is that he failed to achieve an average level of job performance. Regrettably, his unfounded suspicions, coupled with poor advice, led plaintiff to refuse to sign the evaluation of his job performance. This clearly exhibited a negative attitude toward any need for improving his work. At the very least, plaintiff's misunderstanding of the evaluation procedure is a rather clear indication of his inability to cooperate with his supervisors. Baker was justified in believing that plaintiff should be terminated as an unsatisfactory worker.

We further find as a fact that age played no part in the decision to dismiss plaintiff. No evidence indicates that age was considered, other than the bare fact that 17 year old Mary Boone Pace was hired to replace plaintiff, then age 48. An inference of discrimination, however, does not arise from this fact since Mary Boone Pace was number one on the hiring register at the time of plaintiff's termination and for that reason was selected by Baker. Moreover, the credible evidence is that she was not considered for employment until Baker decided that plaintiff had to go. Plaintiff's contrary insinuation is completely unfounded. Furthermore, in September 1978, at the time of an EEOC investigation, the average age of postal service employees at the Aberdeen office was 49.3 years; Baker was then 59 and Jackson 43. Finding no evidentiary basis to sustain his claim that his dismissal was age related, we find as a fact that plaintiff was fired solely because of inadequate performance

without regard to his age.

II CONCLUSIONS OF LAW

Jurisdiction is clearly present under 39 USC § 409 which grants the district courts jurisdiction for all suits brought against the postal service. Nevertheless, the parties differ as to the applicability of the Administrative Procedure Act (APA, 5 USC § 551 et seq., to postal employees. The parties further disagree as to what constitutes a legitimate cause for dismissal under the Age Discrimination in Employment Act (ADEA), 29 USC § 621 et seq. We review each Act separately.

A. *APA*

Section 410 (a) of the 1970 Postal Reorganization Act, 39 USC § 101 et seq. specifically exempts the postal service from the requirements of the APA in regard to employees.[1] *See* Blondo v Bailar, 548 F. 2d 301, 304 (10 Cir. 1977). Consequently, the court lacks the power under the APA to determine whether plaintiff's dismissal was arbitrary, capricious or an abuse of discretion. NAACP v. United States Postal Service, 398 F. Supp. 562 (N.D. Ga. 1975). Despite the inapplicability of the APA, most federal courts have held that postal service employees are nonetheless entitled to

[1] Section 410 (a) provides:

Except as provided by subsection (b) of this section, and except as otherwise provided in this title or insofar as such laws remain in force as rules or regulations of the Postal Service, no Federal law dealing with public or Federal contracts, property, works, officers, *employees*, budgets, or funds, including the provisions of chapters 5 and 7 of title 5, shall apply to the exercise of the powers of the Postal Service. (our emphasis).

nonstatutory judicial review of agency determinations concerning dismissal. We agree that lack of any judicial review would provide no remedy when procedural requirements are not met and would allow arbitrary and capricious dismissal of employees. Moreover, there is a strong presumption in favor of judicial review of administrative action, especially in conjunction with the general jurisdictional grant of 39 USC § 409 (a). *See* Neal v. United States Postal Service, 468 F. Supp. 958, 961 (D. Utah 1979); Oates v. United States Postal Service, 444 F. Supp. 100, 102 (S.D. N.Y. 1978); Withers v. United States Postal Service, 417 F. Supp. 1, 3 (W.D. Mo. 1976).

The scope of such nonstatutory review is quite narrow, being limited to determining "whether the administrative action has complied with the required procedural due process or whether the administrative action is arbitrary or capricious." Coffman v. Bolger, 590 F. 2d 1366 (5 Cir. 1979), Adkins v. Hampton, 586 F. 2d 1072 (5 Cir. 1978). Plaintiff contends that he was denied procedural rights by Baker's failure to provide him specific reasons for his dismissal in order for him to respond, and also that there was no basis in fact for his discharge. There is no merit in either contention.

It is clear that 5 USC § 7501 et seq., which governs the suspension and removal of federal employees is applicable to the postal service.[2]

[2] 39 USC § 1005 (a) (1) provides that "the provisions of chapter 75 of title 5 (5 USC § 7501 et seq.) shall apply to officers and employees of the Postal Service except to the extent of any inconsistency with --

(A) the provisions of any collective-bargaining agreement negotiated on behalf of and applicable to them; or

(B) procedures established by the Postal Service and approved by the Civil Service Commission."

Section 7513 of 5 USC and pertinent regulations allow removal of "an employee only for such cause as will promote the efficiency of the service," and also require prior notice to the employee of the specific reasons for the dismissal and an opportunity for him to respond. By § 7522 (a) (1), however, an employee is defined as "an individuall who is not serving a probationary or trial period under an initial appointment." Therefore, a probationary employee is not entitled to the procedural rights of a permanent employee and may be summarily discharged. Shaw v. United States, 622 F. 2d 520, 527 (Ct. Cl.), *cert. denied*, --- US ---, 66 L ed 2d 525 (1980). Under 5 CFR § 315.804, a probationary employee dismissed for failure to demonstrate his fitness and qualifications for the job is entitled only to advance written notice consisting of "conclusions as to the inadequacies of his performance or conduct." Specific instances of his inadequacy need not be indicated.

The discharge letter which Baker presented to plaintiff stating that effective August 26 he would be terminated because of unsatisfactory job performance complied with § 315.804's requirement, and constituted the only procedural action necessary to terminate a probationary employee. Clearly plaintiff was deprived of no procedural rights.

Nor does plaintiff fare better on his claim that he was subjected to arbitrary and capricious dismissal. Agency action is arbitrary and capricious when it is "willful and unreasoning action, without consideration and in disregard of the facts or circumstances of the case." First National Bank of Fayetteville v Smith, 508 F. 2d 1371, 1376 (8 Cir. 1974), *cert. denied*, 421 US 930, 44 L ed 2d 86 (1975). We have concluded that plaintiff's termination was grounded on a

rational basis as the facts established in the evidence substantiate the postal service determination that he was unqualified for the position. His charge that he was fired without reason and because of dislike or personal animosity on the part of his superiors is simply not supported by the credible testimony. The substantial evidence indicates that Baker and Jackson acted reasonably to promote efficient service and had ample grounds for concluding from plaintiff's shortcomings and attitude that he should not be continued in employment. Because the dismissal was effected only after due consideration of his overall performance, we decline to hold that it was arbitrary and capricious.

B. *ADEA*

To make out a prima facie case of age discrimination under ADEA, plaintiff must show (1) he was within the protected group (age 40 or older), (2) he was discharged, (3) he was qualified for the position, and (4) he was replaced by a person outside of the protected group. Williams v. General Motors Corp., Slip Opinion Nos. 78-2857, 80-7192, at 11237 (5 Cir. Sept. 14, 1981); Price v. Maryland Cas. Co., 561 F. 2d 609, 612 (5 Cir. 1977); Erwin v. Bank of Mississippi, 512 F. Supp. 545, 551 (N. D. Miss. 1981). Once the plaintiff establishes a prima facie case, the burden shifts to the defendant "to articulate some legitimate, nondiscriminatory reason" for the dismissal. Texas Dept. of Community Affairs v. Burdine, --- US ---, 67 L ed 2d 207, 215 (1981); Loeb v. Textron, Inc., 600 F. 2d 1003, 1011 (1 Cir. 1979). Where the defendant has articulated a legitimate reason for dismissal "the plaintiff must then have an opportunity to prove by preponderance of the evidence that

the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination." *Burdine, supra* at 215.

Plaintiff has tendered proof sufficient to establish a prima facie case of age discrimination. Nevertheless, defendant has effectively rebutted it by convincing evidence that plaintiff was in fact terminated from his job because of unsatisfactory performance. Plaintiff claims that this reason was pretextual and that he was dismissed because of personal animosity and that defendant intended to fire him even before he was hired. He urges the court to find that this is not a legitimate factor on which to base his termination, thereby allowing him to prevail on his age discrimination claim. Defendant, however, argues that having satisfactorily articulated a legitimate reason, plaintiff must show by a preponderance of the evidence that his dismissal was actually related to age.

It is unnecessary, however, to decide whether an employer who fires an employee because of personal animosity, wholly unrelated to age, acts impermissibly under the ADEA. It is sufficient that as the trier of fact we found from conflicting evidence that, despite plaintiff's belief, Baker and Jackson did not act out of spite or dislike in dismissing him from the postal service. Admittedly, plaintiff's superiors on no occasion used explicit language relating to age, and, apart from plaintiff's insinuations that he was fired to make way for a younger person --- which we find to be without factual support -- there are no circumstances to support an inference he was terminated because of age. To the contrary, defendants' evidence

convincingly establishes that plaintiff was fired because of his unsatisfactory job performance. Plaintiff did not demonstrate this reason to be pretextual. Accordingly, plaintiff failed to meet his ultimate burden of proof, and his age discrimination claim necessarily fails.

Let judgment issue dismissing the complaint with prejudice.

This, 5th day of October, 1981.

/s/ William C. Keady

Chief Judge
United States District Court

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

No. EC 80-207-WK-P

ALFRED S. JORDAN, Plaintiff

v.

WILLIAM F. BOLGER, POSTMASTER
GENERAL OF THE UNITED STATES AND
ELEANOR HOLMES NORTON, CHAIRMAN
OF THE EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION, Defendants

JUDGMENT

In accordance with Memorandum of Decision this day released, it is

ORDERED

That plaintiff's claim is dismissed with prejudice.

All costs are taxed to plaintiff.

This, 5th day of October, 1981.

/s/ William C. Keady

Chief Judge
United States District Court

Office-Supreme Court, U.S.
FILED
DEC 20 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-855

In the Supreme Court of the United States

OCTOBER TERM, 1982

ALFRED S. JORDAN, PETITIONER

v.

WILLIAM F. BOLGER, POSTMASTER GENERAL OF THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
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MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioner contends that he was discharged as a probationary federal postal worker without receiving adequate prior written notice.

1. On July 2, 1977, petitioner was hired as a part-time clerk-carrier by the United States Postal Service in Aberdeen, Mississippi (Pet. 5). He was discharged while still in probationary status after receiving the following notice from his supervisor on August 24, 1977 (Pet. 5):

> Due to unsatisfied [*sic*] performance during your probationary period, your employment at the Aberdeen Post Office will be terminated at the close of the work day Friday August 26, 1977.

Petitioner thereafter filed suit in the United States District Court for the Northern District of Mississippi under the Age Discrimination in Employment Act of 1967, 29 U.S.C.

633a, and the Administrative Procedure Act, 5 U.S.C. 551 *et seq.*, alleging that his termination was arbitary and capricious and because of his age (Pet. App. B-1 to B-2).[1]

The district court dismissed the complaint with prejudice (Pet. App. B-1 to B-14, C-1 to C-2). The court expressly found that petitioner was fired because of his unsatisfactory work performance, which was documented in detail (*id.* at B-6 to B-7). Accordingly, the court rejected petitioner's contentions that his termination was arbitrary and capricious or constituted age discrimination. *Id.* at B-7, B-11 to B-14.[2] The court also found that the discharge notice was sufficient to comply with 5 C.F.R. 315.804 (1977), the regulation governing the type of procedural rights due probationary federal employees who are discharged for unsatisfactory conduct (Pet. App. B-11). The court of appeals affirmed summarily (*id.* at A-1 to A-2).

2. The decision of the court of appeals is correct and presents no issue that warrants this Court's review. As the courts below properly concluded, petitioner's right to notice prior to discharge, if it existed at all, was satisfied by the August 24, 1977 notice.[3]

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[1]Petitioner filed his complaint in this case after appealing his discharge to the Equal Employment Opportunity Commission, which remanded to the Postal Service for a hearing. The present action was commenced before that hearing could be held. The EEOC was named as a defendant, but was dismissed on motion for summary judgment (C.A. App. 33) ("C.A. App." refers to the appendix filed in the court of appeals).

[2]The petition for a writ of certiorari does not raise the issues whether the discharge was arbitrary and capricious or discriminatory.

[3]Although the district court assumed that 5 C.F.R. 315.804 (1977) applies here, this civil service rule has been held to be inapplicable to postal employees under Section 410(a) of the 1970 Postal Reorganization Act, 39 U.S.C. 101 *et seq.* *Biondo* v. *Bailar*, 548 F.2d 301, 304 (10th Cir. 1977).

5 C.F.R. 315.804 (1977) provides that "[t]he information in the notice as to why the employee is being terminated shall, as a minimum, consist of the agency's conclusions as to the inadequacies of his performance or conduct." Courts have followed the plain meaning of the regulation in determining whether notice has been adequate. *Jenkins* v. *United States Post Office*, 475 F.2d 1256, 1257 (9th Cir.), cert. denied, 414 U.S. 866 (1973) (postal employee informed by letter that she was terminated for "failure to meet minimum standard requirements"). See also *Medoff* v. *Freeman*, 362 F.2d 472, 474 (1st Cir. 1966), and *Harrington* v. *United States*, 673 F.2d 7, 10 (1st Cir. 1982). The notice to petitioner indicating unsatisfactory performance during his probationary period was thus sufficient to meet the requirement of 5 C.F.R. 315.804 (1977).[4]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

DECEMBER 1982

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[4]Petitioner's claim that he had no actual notice of the reasons for his discharge (Pet. 7) is belied by the district court opinion. As the court noted, many of petitioner's work-related deficiencies were discussed with him (see Pet. App. B-4 to B-5; II Tr. 278-316) and petitioner conceded at trial that these incidents were brought to his attention when they occurred, that he was given an opportunity to explain his conduct, and that he was further instructed on how to do each task properly (I Tr. 19-25, 27-39, 46-82, 87). Cf. *Codd* v. *Velger*, 429 U.S. 624, 628 (1977). Thus, petitioner's claim would fail even under the standards applicable to non-probationary employees. See *Greenway* v. *United States*, 175 Ct. Cl. 350, 358-359, cert. denied, 385 U.S. 881 (1966) ("[i]f one is well aware of what he is being charged with, complaints as to ambiguity or lack of specificity will be rejected"); *Connelly* v. *Nitze*, 410 F.2d 416, 424 n.10 (D.C. Cir. 1968) (notice "adequately apprised [petitioner] of what he [was to] defend against — and that is the central standard by which notice is to be measured").